

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1102/2018

CATCHWORDS

Retail Lease, whether retail premises lease, manufacture, production and storage of nutritional supplements, online sales, whether Retail Leases Act 2003 applies, test to be applied, ultimate consumer test, whether premises open to the public.

APPLICANT	Bulk Powders Pty Ltd (ACN: 142 328 486)
RESPONDENT	Seicon Pty Ltd (ACN: 006 154 418)
WHERE HELD	Melbourne
BEFORE	L Forde, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	10 December 2018
DATE OF ORDER AND REASONS	14 December 2018
CITATION	Bulk Powders Pty Ltd v Seicon Pty Ltd (Building and Property) [2018] VCAT 2000

ORDER

- 1 The proceeding is dismissed.
- 2 Liberty to apply on the question of costs. Such liberty to be exercised, if at all, by 15 January 2019.

L Forde
Senior Member

APPEARANCES:

For Applicant	Mr S Supple – representative
For Respondent	Mr S Hopper of counsel

REASONS

- 1 This proceeding has been brought by Bulk Powders Pty Ltd (**the tenant**) against Seicon Pty Ltd (**the landlord**) seeking a declaration that its lease of premises at 4 Capital Court, Braeside VIC 3195 (**the premises**) is governed by the *Retail Leases Act 2003* (Vic) (**the Act**).
- 2 Pursuant to a lease commencing 1 December 2014 (**the lease**), the landlord leased the premises to the tenant for a period of five years.
- 3 The landlord issued a Notice of Default dated 13 July 2018 seeking payment from the tenant of management fees and other administrative costs.
- 4 The tenant asserts that the premises are a retail premises within the meaning of the Act. The landlord denies that the premises are retail premises under the Act.
- 5 On 30 July 2018, on the application of the tenant, the landlord was restrained by the Tribunal until further order or agreement between the parties from re-entering or interfering with the tenant's quiet enjoyment of the premises in reliance on the landlord's notice of breach of lease dated 13 July 2018.
- 6 The Tribunal further ordered on 30 July 2018 that the matters to be determined at the hearing were:
 - i whether the managing agent's fees constituted outgoings payable by the tenant under the lease; and
 - ii whether the lease is a retail premises lease attracting the operation of the Act.
- 7 The landlord has withdrawn the notice of breach of lease dated 13 July 2018. Accordingly, it is unnecessary to determine whether the managing agent's fees constituted outgoings payable by the tenant under the lease.
- 8 The tenant claims in an affidavit of Steven Supple affirmed 6 December 2018 to be entitled to recover \$29,308.04 paid to the landlord on the grounds that annual disclosure statements had not been provided and the landlord was not entitled to charge for land tax and the first disclosure statement preparation fee under the Act (**outgoings claim**.)
- 9 The Landlord did not object to the outgoings claim being addressed in the proceedings.

Issues to Decide

- 10 I must decide the following issues:
 - i Are the premises retail premises under the Act?

- ii If the premises are retail premises under the Act, is the tenant entitled to recover moneys paid to the landlord for land tax, outgoings and disclosure statement costs?

Witnesses

- 11 Mr S Supple, the son of a director of the tenant gave oral evidence on behalf of the tenant and relied on his affidavit dated 6 December 2018. Mr B Murphy, leasing agent gave oral evidence on behalf of the landlord.

Retail Leases Act 2003

- 12 Section 4 of the Act defines “retail premises” as follows:
 - (1) In this Act, *retail premises* means premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for—
 - (a) the sale or hire of goods by retail or the retail provision of services;
 - or
- 13 The provisions of s 94 of the Act are designed to prevent contracting out of its provisions. It provides as follows:

The Act prevails over retail premises leases, agreements etc.

(1) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or inconsistent with anything in this Act (including anything that the lease is taken to include or provide because of a provision of this Act).

(2) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it purports—

(a) to exclude the application of a provision of this Act; or

(b) to limit the right of a party to the lease to seek resolution of a retail tenancy dispute under Part 10 or otherwise to limit the application of that Part.

(3) A provision contained in any other agreement or arrangement (whether or not between parties to a retail premises lease) is void if that provision would be void under this Act if it were contained in a retail premises lease.

Lease Provisions

- 14 The critical provisions of the lease are, in the present context, as follows:

(1) THE LESSEE COVENANTS AND AGREES with the Lessor as follows: –

use of premises

(i) except with the prior written consent of the Lessor, not to use or permit the Premises to be used for any purpose other than the purpose specified in item 13 of the Schedule.

15 Item 13 of the Schedule provides as follows:

Schedule

13. Use of the premises: PRODUCTION, PACKAGING AND STORAGE OF HEALTH SUPPLEMENTS (NOT RETAIL). By executing this lease you acknowledge that your use of the premises is not predominantly retail and therefore does not invoke the Retail Leases Act (2003).

Tenant's Evidence

16 Mr Supple gave the following evidence:

- i The tenant's business started in 2008. He ran the business for the first five or six years and now works in the business three days a week;
- ii The tenant manufactures, develops and produces sports nutrition products for the end consumer. It sells directly to the consumer primarily through on-line sales. It manufactures product about once a week and otherwise deals with customer enquiries, pick and pack, deliveries and complaints;
- iii He signed the rental application form after it was completed;
- iv He does not recall whether in discussions with Mr Murphy before the lease was finalised, there was discussion of the sales being online as opposed to face-to-face;
- v 100% of sales is directly to the end user. The business tried a wholesaler arrangement but found it too difficult. Wholesaling stopped in March 2018;
- vi Customers who have a long trading history with the tenant, on occasions, attend the premises, by appointment, to collect product. The tenant is selective about who can attend the premises. The tenant will provide these customers with the street address of the premises. The address is otherwise not publicly available. The tenant chose to minimise face to face sales;
- vii There is no signage on the premises;
- viii Face to face sales are not encouraged as it is difficult to make money from customers coming to the premises. You might spend 20 minutes talking to the customer for a \$10 profit on the sale;
- ix Reference was made to articles and reports including a Colliers International industrial report to support the claim that online retail is the way of the future as opposed to bricks and mortar retail;

- x Between 1 December 2014 and 21 November 2018, the tenant made 37,351 sales. Of these sales, approximately 5% were face to face sales directly to customers coming to the premises;
- xi The landlord knew before the tenant entered into the lease that the tenant was operating an on-line business direct to the consumer;
- xii In addition to selling a product, the tenant offers a service of convenience. The tenant offers a service of picking and packing product, free delivery and advice;
- xiii When questioned about what the words “(no retail)” in the permitted use clause of the lease, Mr Supple stated that he saw the words as an invalid reference in the lease. As far as he was concerned a sale is a sale and there is no distinction as to whether it is done online or whether it is done face-to-face;

Landlord’s Evidence

- 17 The landlord put the lease, Disclosure Statement, Rental Application and Google maps curb side view of the premises into evidence through Mr Supple.
- 18 The Google maps curb side view of the premises taken in June 2017 identifies the premises has no visible signage.
- 19 Mr Murphy’s evidence can be summarised as follows: -
 - i He is employed by Cameron Industrial Commercial as a leasing agent. He provided Mr Supple with a rental application form for the premises. His understanding of the tenant’s business was that it manufactures and warehouses nutritional supplements which are sold via direct mail;
 - ii It is not disputed that both Mr Supple and Mr Murphy completed parts of the rental application form for the premises and Mr Supple signed on behalf of the tenant. Mr Supple wrote on the application:
 TYPE OF BUSINESS? sports nutrition
 USE OF PREMISES? production, packaging, storage
 - iii The application form included a question “Are you a Retail Business?” Mr Supple answered the question for the tenant by placing an “x” in the No box. This was not disputed by Mr Supple.
 - iv He prepared the Disclosure Statement and Lease. The Disclosure Statement which was signed by Mr Supple contained a statement that the permitted use was “Production, packaging and storage of health supplements.”
 - v He was not aware there would be direct sales from the premises;
 - vi The lease was not a retail lease because the tenant’s business was predominantly manufacturing, storage and distribution of the

manufactured product. Leased premises covered by the Act are premises where consumers buy at the premises and transact face-to-face. The premises were in an industrial zone with a predominant use being industrial.

Application of the Retail Leases Act 2003

- 20 In order to answer the first issue it is necessary to determine whether the premises are used or are to be used, wholly or predominantly by the tenant under the terms of the lease for the sale or hire of goods by retail or the retail provision of services.
- 21 Mr Supple submitted that the Act does not discriminate against different types of sale by retail or retailing provision of services. Whether the sales are provided to the ultimate consumer from the premises via face, phone, email, ecommerce, conducted electronically or via the internet, the meaning of retail premises is not affected.
- 22 I do not accept Mr Supple's submission. The classification of premises as retail premises under the Act is affected by whether sales are face to face with the consumer or by other means.
- 23 It is not disputed that the tenant has established on the evidence that it supplies goods to the ultimate consumer of those goods. Accordingly, one indicia of retail recognised by the authorities, being the requirement that a retail supply involves a supply of goods or services to the ultimate consumer, is satisfied.
- 24 Another indicium of retail recognised by the authorities is whether the premises are open to the public.
- 25 In *536 Swanston Street Pty Ltd v Harbrut Pty Ltd* (1988) ConvR 54 – 323, Kaye J held that:

The question which then arises is: are those provisions properly described as retail, namely, the sale of goods by retail or the retail provision of services?

I have been referred to several definitions by authorities of what is described as retail shop and retail trade. Perhaps the most succinct statement from which assistance is to be derived is from that made by Viscount Dunedin in his speech in *Turpin v Middlesbrough Assessment Committee and Kaye & Eyre Brothers, Limited* [1931]AC 451 at p474. His Lordship then said, referring to buildings, that they were **buildings to which the public can resort** for the purpose of having particular wants supplied and services rendered to them.

It is, in my view, clear that the demised premises fall within that description of **being available to members of the public** for the purposes of having their food and drink requirements supplied and services of discotheque entertainment provided to them. Accordingly, in my view, the demised premises are retail premises within the meaning of the Act.

(emphasis added)

- 26 In *FP Shine (Vic) Pty Ltd v Gothic Lodge Pty Ltd* [1994] 1 VR 194, Ashley J considered whether a caravan park was a retail premises under the *Retail Tenancies Act 1986* (Vic)¹:

In 536 Swanston Street, Kaye J had to consider a lease of premises used as a restaurant, cabaret and discotheque. **Members of the public could enter the premises upon payment of an admission fee.**

Having paid that fee, **any such person** could enjoy music and entertainment provided and could use of facilities for dancing and so on. In addition, food and drink could be purchased.

His honour held that (1) the premises were used wholly or predominantly for carrying on a business – that is, the business of provision of entertainment; (2) the business included both sale of goods (that is, sale of goods and drink) and provision of services (that is, the services of the discotheque); and (3) that the provision of goods and services were properly characterised as “retail”.

In my respectful opinion his honour’s conclusions were correct and may be applied to the facts now under consideration. In the present situation the business involving the retail provision of services is the provision of serviced caravan sites with necessary ancillaries of kiosk, amenities block and recreation room. **It has a retail characteristic, being provision of services to members of the public** wishing to avail themselves of the services in return for payment of money. It is no less retail provision of services because they are provided by way of site hirer. No doubt by analogy, the admission to the discotheque in 536 Swanston Street was only for some limited period.

(emphases added)

- 27 In *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor* [2013] VSC 344, Croft J considered whether the premises in that case was “open to the public” and concluded that²:

In the present circumstances I am satisfied that the premises is open to the public. There is no evidence to suggest that any person or class of persons is prohibited or otherwise prevented from being able to utilise the conference and function services provided by the defendants at the premises.”

- 28 The Court of Appeal in *IMCC Group Australia Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178 required consideration of more than the ultimate consumer test when making a determination of whether a property is a retail premises for the purpose of the Act. Consideration extends to whether or not the premises are open to the public. The Court held:

46 We rejected the landlord’s submission that the judge approached the task on the basis that an ultimate consumer test alone suffices to determine whether there has been a retail provision of services. The

¹ at 198

² At [34]

judge looked at other matters, including whether the services are generally available to any person for a fee. **Ashley J referred to the provision of services to members of the public in FP Shine. In Fitzroy Dental Croft J looked at whether the services were open to the public. On analysis, it seems to us that their honours were concerned with whether there were restrictions on access to the service and who could use it.** They were not concerned with the characteristics of the user (for example, whether the user was an individual or a business). Both judges relied on Wellington. In that case, Nathan J made it clear that the user may, but need not, be a member of the public.

47 Here, even if one assumes that there may be a limited number of people who use the service (because they need to use large trucks to transport the goods to be stored) that would not matter. In any event, the tenant does provide transport facilities if required on payment of an extra fee. **In short, the tenant does not impose any relevant restrictions on access. Anyone can use a service and the tenant's office is open during business hours to customers and prospective customers are like.**

...

50 In summary, the services were used by the tenant's customers who paid a fee. Any person could purchase the services if the fee was paid. **The tenant's business was open during normal business hours.** The tenant's customers have not passed on the services to anyone else. They were the ultimate consumers of the tenant services. In isolation, none of these features would suffice to constitute the premises as retail premises. Conversely, the absence of one or more of them, would not necessarily result in a finding that the premises were not retail premises. However, in the circumstances of this case when all of those features are taken together, the conclusion must be that the premises are retail premises.

(emphasis added).

- 29 In this case, the evidence is that the premises are not open to the public. In particular:
- i There is no signage at the premises identifying it to the public as being the premises of the tenant;
 - ii Mr Supple gave evidence that the tenant did not want its location to be publicly known in part due to suspicious fires occurring at a nearby competitor's premises, for the safety of its female staff and for commercial reasons;
 - iii Mr Supple gave evidence that only customers with a long-term trading history are permitted to enter the premises by appointment.
- 30 The respondent carries on a business of selling certain products, with sales predominantly on line. Whilst that activity might be considered to be "retail", in my view that does not make the premises *retail premises*. It is

clear on the evidence that the premises are used predominantly for production and storage of product. The fact that product sold on line is shipped from the storage facility does not, in my view, make the storage facility *retail premises*.

- 31 The use of the premises for production and storage of product is consistent with the express permitted use of the premises under the lease. And for the purpose of determining whether premises are retail premises, it is the use permitted under the lease that is relevant.
- 32 I find that the premises are not retail premises. As the premises are not covered by the Act it is unnecessary to determine whether any payments made by the tenant are recoverable under the Act.
- 33 Accordingly, the tenant's claim is dismissed.

L. Forde
Senior Member